IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 95 OF 1994.

The State of Maharashtra .. Appellant
(Original Complainant)

vs.

Shivaji Damu Garud
Panchshilnagar,
Nashik Road. .. Respondent.
(Original Accused)

Smt. V.R.Bhosale, APP for State.

Miss.Shobha Gopal, Advocate for the Respondent absent.

CORAM : S.S.PARKAR &
S.R.SATHE,JJ.

DATED : 28TH OCTOBER, 2004.

ORAL JUDGMENT (Per S.R.Sathe,J) :

1. The State of Maharashtra has preferred this appeal against the judgment and order passed by the Sessions Judge, Nasik, in Sessions Case No. 245 of 1991 whereby the accused was acquitted of the offence punishable under section 302 of I.P.C.

2. The brief facts giving rise to this appeal are as under :

. Marriage of deceased Chabubai had taken place with the accused about nine months prior to

the incident. After marriage she had started residing with her husband at Bombay. The father-in-law and mother-in-law of the deceased were also residing there. The accused was not having any job and as such he was brought to Nasik Road as the maternal uncle of the deceased was residing there. The maternal uncle was asked to find out one room as well as a job for the accused and accordingly the maternal uncle procured one room in Shashikant Aher Chawl at Nasik Road. The deceased and accused started residing in the said room, since 15 days prior to the incident. It is the prosecution case that the accused used to consume liquor and harass deceased Chabubai. He also used to raise doubt about her chastity. On 11.6.1991 the accused and the maternal uncle of the deceased, namely Sona Jadhav had gone at construction site. Both of them returned at about 7.30 p.m. and then the accused went to his house and Sona Jadhav returned to his house. On that day also, accused picked up quarrel with deceased and assaulted her. Deceased had prepared meals for accused and as such she was asking him to take meals. However, accused refused. As deceased was hungry she took her meals and on that the accused got annoyed and he lifted lighted kerosene lamp which was in the room and with that he set deceased on fire. As a result of the same

deceased raised shout, the accused did not help her, but on the contrary he ran away. Deceased extinguished the fire by rolling on the ground as well as pouring water. As there was no one else in the house she went to her maternal uncle who was staying hardly at a distance of about 100 to 200 feet from the said room. She narrated the incident to her maternal uncle who immediately brought one rickshaw and took the deceased to Civil Hospital, Nasik. the police constable on duty, finding that a woman with burn injuries has been admitted to the hospital informed the Special Judicial Magistrate Jaiprakash Chavan to record dying declaration . On receipt of the requisition the Special Judicial Magistrate, went to the Civil Hospital. After meeting the doctor on duty and ascertaining that the deceased was in a position to make a statement, he recorded the dying declaration of the deceased as per her say. In the meantime the P.I. on duty had also received information about admission of the deceased in the hospital. He, therefore, went to Civil Hospital, Nasik, and recorded the statement of the deceased wherein also deceased told that there was quarrel between accused and her and accused assaulted her as she was insisting that he should take food. When he refused to take food, as she was hungry, she took the meals. On that accused got annoyed

and lifted the kerosene lamp and the deceased was set on fire. The P.I. therefore registered the crime at C.R.No.155 of 1991 for the offences punishable under section 307, 323, 504, 506 of I.P.C. The deceased succumbed to the burn injuries on 12.6.1991 at about 11.15 a.m. When police came to know about the death of Chabubai they went to the Civil Hospital and drew the inquest panchanama exhibit 15. Police also visited the place of offence and drew the panchanama exhibit 14. The police recorded the statement of other witnesses and arrested the accused on the same day i.e. 12.6.1991 at about 11.30 a.m. As the accused was having some burn injuries on his person, he was sent to medical officer for examination. The I.O. then sent the attached property viz. half burnt pieces of saree and pant and shirt found at the place of offence, kerosene lamp etc to the C.A. for examination. After receipt of the C.A.report and completion of investigation police submitted the chargesheet in the Court of J.M.F.C. Nasik Road, against the accused for the offence punishable under section 302 of I.P.C. Finding that accused is chargesheeted for the offence which is exclusively triable by the Sessions Court, the learned J.M.F.C. committed the case to Sessions Court, Nasik.

3. The Sessions Judge, Nasik framed charge exhibit 1 against the accused for the offences punishable under section 302 of I.P.C. The charge was read over and explained to the accused. The accused pleaded not guilty and claimed to be tried. His defence was of total denial.

4. In order to prove the charge levelled against the accused, the prosecution examined as many as 10 witnesses consisting of Special Judicial Magistrate Jaiprakash Chavan- exhibit 5, Dr. Sharadchandra Pandurang Pagare who did the post mortem-exhibit 8, panch witness Ravindra Pagar-exhibit 11, another panch namely Baba Sonawane-exhibit 13, witness Malan Gaikwad-exhibit 16, maternal uncle of deceased, Sona Jadhav-exhibit 17, Dr. Narayan Degaonkar, who treated the deceased and was present at the time of recording dying declaration- exhibit 20, witness Pramila Jadhav, wife of the maternal uncle of the deceased - exhibit 21, Dr. Sheela Shah, who examined the accused - exhibit 24, Investigating Officer Lalsingh Paliwal - exhibit 26 and PSI Anil Akade exhibit 31. The prosecution also produced the panchanama of place of offence exhibit 14, inquest panchanama - exhibit 15, arrest panchanama - exhibit 12, dying declaration

exhibit 7, and C.A. report -exhibit 25. From the suggestions put to the P.W's and from the statement of the accused recorded under section 313 Cr.P.C. it appears that the defence of the accused was of total denial. Ofcourse, from suggestions put to the prosecution witnesses it appears that it was also tried to be suggested that the accused and deceased were sleeping in the room and both of them sustained burn injuries.

5. After considering the evidence adduced by the prosecution the learned trial judge came to the conclusion that the evidence of two witnesses namely maternal uncle Sona Jadhav -exhibit 17 and his wife Pramila Jadhav - exhibit 21 is not consistent and trustworthy. He also held that from the nature of the injuries sustained by the deceased it appears that she was in fact not in a position to make statement either before Sona Jadhav or before the police or the Special Judicial Magistrate. He therefore disbelieved the prosecution story and held that prosecution has failed to prove the charge levelled against the accused. He therefore acquitted the accused.

6. Being aggrieved by the said judgment and order, the State of Maharashtra has filed the present appeal. In this appeal before us,

Smt.Bhosale, learned APP has urged two points. Firstly, she submitted that the learned trial judge has not properly appreciated the evidence on record and has given undue importance to the minor discrepancies in the evidence of witness Sona Jadhav and Pramila Jadhav and disbelieved their testimony. Secondly, she canvassed before us that there are in fact three dying declarations, two written and one oral. There is no material discrepancy in these three dying declarations. The name of the accused is stated by the deceased in all the three dying declarations. Not only that but she has also stated as to how she sustained burn injuries. She therefore submitted that the trial court has wrongly disbelieved the dying declaration. She therefore argued that the appeal be allowed and the accused be convicted for the offence punishable under section 302 of I.P.C.

7. From the perusal of the record it appears that one Ms. Shobha Gopal has been appointed as advocate to represent the accused in the instant case. The present case was on the final hearing board since Monday i.e. from 25.10.2004, however, she did not turn up till today. Finding that the advocate for the accused is absent, with the help of learned APP we have perused the entire evidence on record in detail.

8. From the perusal of the record it is very clear that it is not in dispute that the marriage of deceased and accused had taken place about nine months prior to this incident. As alleged by the prosecution witness it is also an admitted fact that since few days prior to the incident accused and deceased had started residing in the room at Shashikant Aher Chawl where the incident took place. It is also not in dispute that in between the night of 11.6.1991 and 12.6.1991 Chabubai sustained burn injuries and as a result of the same she was admitted in Civil Hospital, Nasik at about 3 a.m. Admittedly she succumbed to the said injuries on 12.6.1991 at about 11.15 a.m. Naturally, the question arises whether the death of Chabubai was suicidal, accidental or homicidal. It is quite evident from the material on record that at no point of time it is even suggested by the defence that the death of Chabubai was suicidal. From the suggestion put the prosecution witness it appears that contention of accused is that death was accidental but accused has not uttered even a single word to that effect in his statement under section 313 Cr.P.C.

9. In order to prove that the burn injuries sustained by the deceased were caused at the hands

of the accused and death of Chabubai was homicidal, the prosecution is mainly relying on the evidence of oral dying declaration made by Chabubai before Sonu Jadhav, the maternal uncle of the deceased and his wife Pramila Jadhav. Besides this prosecution is relying on the other two written dying declarations, one recorded by the Special Judicial Magistrate Jaiprakash Chavan-exhibit 5 and the other recorded by Police Inspector Anil Akade-exhibit 31. Witness Sonu Jadhav exhibit 17 has clearly stated that since 15 days prior to incident accused and Chabubai had started residing in a room which was at a distance of 200 km from his house. On the day of incident at about 2.30 a.m. Chabubai came to his house. She had sustained burn injuries and was crying. There were no clothes on her person. He, therefore, immediately gave one bed sheet for covering her body and then took her to Civil Hospital, Nasik. At that time his wife Pramila also accompanied them. He has also stated that at that time Chabubai told him that the accused poured kerosene on her person and set her on fire. Similarly, witness Pramila Jadhav exhibit 21 has also stated that after the marriage between deceased and accused initially they were staying at Bombay and subsequently few days prior to the incident they had come to Nasik and started

residing near their house. She has further stated that accused used to harass Chabubai and used to beat her as he was suspecting her character. On 12.6.1991 at about 2.30 a.m. Chabubai came to their house and at that time she had sustained burn injuries. She told them that her husband returned home at about 10 p.m. and thereafter he had a quarrel with her. She was requesting him to take meals but he refused, so she took her meals, however the accused got annoyed and he assaulted her and lifted the burning kerosene lamp and set her on fire. It is pertinent to note that the evidence of these two witnesses is not relied by the trial court merely on the ground that there are some discrepancies in their evidence. Firstly, the trial court has observed that though Pramila Jadhav has stated in her deposition that accused was suspecting about the character of deceased Chabubai, Sona Jadhav has not actually stated anything about the same. It must be noted that merely because Sona Jadhav has not stated this particular thing it can not be said that the testimony of these two witnesses is not reliable or that there is material discrepancy or contradiction in their evidence. Besides this the saidpoint has no direct bearing on the actual incident of setting Chabubai on fire. On the contrary, when both of them have stated that there

was dispute between Chabubai and accused, and accused assaulted her, that was sufficient. The discrepancy noted by the learned trial court, by no stretch of imagination can be said to be material which could go to the root of the matter and show that no such incident as alleged has occurred. Another discrepancy which weighed withthe trial court is that Sona Jadhav has stated that deceased told that accused poured kerosene on her person and set her on fire, while witness Pramila Jadhav exhibit 21 has stated that at that time deceased told them that accused lifted the burning kerosene lamp and with the help of the same she was set on fire. So it appears that the little discrepancy is only with regard to the mode of setting fire, but so far as the author of the said mischief is concerned, there is no discrepancy and both have categorically sated that Chabubai told them that at the relevant time accused and deceased were alone in the house, quarrel took place and ultimately she was set on fire by the accused. In fact this minor discrepancy in their evidence would indicate that they are not tutored. Many times when witness is deposing in the court after lapse of considerable time he may forget to tell the exact sequence of events. Ultimately one has to see the substratum of the evidence. In our opinion, the discrepancy

in the evidence of witness Sonu Jadhav and Pramila Jadhav was certainly not sufficient to discredit their testimony.

10. There are two written dying declarations made by Chabubai. First is recorded by Special Judicial Magistrate, Jaiprakash Chavan exhibit 5. He has stated that on 12.6.1991 at about 4 a.m. he received requisition for recording dying declaration and thereafter he immediately went to the Civil Hospital, Nasik. After reaching there he ascertained from the doctor as to whether Chabubai was in a position to give statement. When doctor examined Chabubai and certified that she was in a position to give statement and accordingly made endorsement on exhibit 7, he recorded dying declaration of Chabubai as per her say. It is pertinent to note that he has also stated that after recording dying declaration he again asked the doctor to examine the patient and the doctor found that Chabubai was conscious and in a state of giving declaration and she was quite oriented. If we see the said dying declaration exhibit 7 we find that therein also deceased Chabubai has clearly stated that her marriage with accused took place about nine months back and he used to harass her raise suspicion about her character. On that day at night she was asking

accused to take meals but he refused and ultimately accused assaulted her and lifted burning kerosene lamp and set fire to her saree which was on her person and ran away from the place. She rolled herself on the ground and extinguished the fire. As there was no one else she went to her maternal uncle Sonu Jadhav and he took her to Civil Hospital, Nasik. From this dying declaration it is very clear that Chabubai was in a position to make a statement and that is why she has given proper answers to the questions put to her by the Special Judicial Magistrate. There is nothing on record to indicate that the said dying declaration was not voluntary or that she was tutored by anyone. Though suggestion is made that said dying declaration was recorded as per the instructions of the maternal uncle of the deceased, witness Jaiprakash Chavan has categorically denied the said suggestion. There is no reason why the Special Judicial Magistrate should depose against the accused. We find that dying declaration exhibit 7 bears endorsement and signature of the doctor on duty namely Dr. Degaonkar. Not only that Dr. Degaonkar exhibit 20 has also stated that on that day when Special Judicial Magistrate Jaiprakash Chavan came to him, he examined the patient namely Chabubai and he found that she was in a position to give statement

and as such necessary endorsement was made. Then it must also be noted that the alleged dying declaration has been recorded within short time from the occurrence of the incident. There was infact no sufficient time to tutor Chabubai. Besides this, there is no reason why Chabubai should depose against her husband if really no such incident had occurred. The dying declaration exhibit 7 is quite cogent, consistent and voluntary.

11 The other dying declaration is in the form of complaint recorded by PSI Anil Akade exhibit 31. He has stated that on receipt of information about the incident, he had gone to Civil Hospital, Nasik. When doctor told him that the patient was in a position to give statement, he recorded the statement of injured Chabubai as per her say. If we read the said statement which is treated as complaint exhibit 32 we find that therein also the deceased has categorically stated that on that day at about 10.00 p.m. there was some quarrel between accused and her, she asked the accused to take meals but he refused. As she was hungry she took her meals but on that accused got annoyed and started saying as to how she took meals first and on that count started abusing and said that boys were standing outside the house for her. In the

statement before police she has also stated that at that time the accused lifted the burning kerosene lamp (chimney) and her saree was set on fire. Immediately thereafter, the accused ran away from the said place. She rolled herself on the ground and also poured water on herself and extinguished the fire. The trial judge has again relied on some minor discrepancies in these two dying declarations and disbelieved both. He has stated that in the first dying declaration the deceased has stated that she extinguished the fire by rolling herself on the ground while in the other she has stated that she extinguished the fire with the help of water. It is needless to say that the said discrepancy is not at all material. The main question is whether she extinguished the said fire by rolling or by pouring water on herself or by both ways, matters very little. In fact, the learned trial judge has also observed that except this there is no other material discrepancy in these two dying declarations. However, even then he has disbelieved it and held that at the relevant time accused must not be in a position to make statement. For that purpose reliance has been placed by him on the evidence of Dr. Degaonkar and in particular the answers given by him to Court questions. He has observed that as per the

doctor's version the deceased was not shouting and crying. In such type of burns, patient gets electrollite imbalance. It causes hypovolumic shock. Due to this the patient is likely to go in renal failure and may also go in cardiac arrest. The level of consciousness goes on decreasing. The patient is likely to talk in low voice and also irrelevant. So, according to him the burns sustained by Chababai were very serious. Infact she had sustained burns to the extent of 91% and as such it is difficult to believe that she was in a position to make dying declaration either before the Special Judicial Magistrate or before the police. He has therefore observed that both the dying declarations can not be relied upon. Firstly, it must be noted that Dr. Degaonkar has nowhere specifically stated that the physical and mental condition of Chabubai was such that she was not in a position to give statement. On the contrary, he has categorically stated that at the relevant time he examined the patient and she was found conscious, oriented and in a position to give statement. He has also stated that though pain killer was given to her, the same was given to her after dying declaration. An attempt has been made to show that pain killer was given prior to the dying declaration and as s result of the said pain killer the deceased had gone in coma.

In fact that suggestion is also specifically denied by Dr. Degaonkar. Merely because deceased had sustained 91% burns one can't jump to the conclusion that she must not be in a position to give statement. In fact there are thousands of incidents wherein though patient had sustained grave burn injuries, were in a position to make statement. In fact in the case Suresh Vs. State of Madhya Pradesh, AIR 1987 SC 60 the patient had sustained 100% burns of second degree and the patient succumbed on the very day of admission to the hospital. Even then, the doctor had categorically stated in the said case that at the relevant time when the patient made a statement the patient was capable of deposing and the said evidence was accepted by the Apex court and the accused was convicted. So, merely because in the instant case the deceased had sustained 91% burns it can not be said that she was not in a position to make a statement. Due weightage shall have to be given to the evidence of doctor Degaonkar which clearly establishes that at the relevant time Chabubai was in a position to make statement.

12. There are in fact many other important circumstances which also lend support to prosecution version. Firstly, it must be noted that admittedly at the relevant time the accused

and deceased were only in the room in question. The alleged incident has taken place in between 10.30 p.m. and 2.30 a.m. The trial court has observed that the prosecution has not brought on record any explanation as to where was deceased during the period from 10.30 p.m. to 2.30 a.m.. In our view it was not at all necessary. Merely because the witness has said that on that day quarrel took place and thereafter the accused lifted burning kerosene lamp and set her on fire, that does not necessarily mean that the alleged incident took place exactly at 10.30 p.m. It appears that the quarrel must have started between deceased and accused at about that time or after she was insisting that the accused should take meals but as accused refused ultimately she finished her meals and on that count the accused got annoyed. Incidentally, it must be noted that if we see the panchanama of place of offence, it is clearly mentioned therein that at the time of the panchanama one plate full of food was found there. So, that also indicates that the version given by the deceased is true and correct. It is important to note that at one stage suggestion was put to the prosecution witness that at the relevant time accused and deceased were sleeping in the room and both of them sustained burns. It obviously means that the presence of the accused

at the relevant time in the room is admitted. Naturally, in such circumstances it was necessary for the accused to give explanation as to how deceased sustained injuries particularly when the prosecution had adduced other cogent evidence to show that she had sustained injuries as a result of the act of the accused, namely setting her on fire with the help of lighted kerosene lamp. But we find that no such explanation is given by the accused. A suggestion is put to P.W. Pramila Jadhav, exhibit 21 that after this incident the accused had come to Sona Jadhav and had narrated the incident and had even brought one rickshaw. So, this would also indicate the presence of the accused at the time of incident. It is pertinent to note that it has come on record that at the relevant time the prosecution witness Sona Jadhav and Pramila Jadhav took deceased to Civil Hospital. This is not at all challenged in the cross examination. So the defence that accused brought rikshaw and had taken Chabubai to hospital cannot be acepted. Much is made about the burn injuries sustained by the accused. It seems that the trial court has given unnecessary weightage to the fact that the prosecution had not initially examined doctor Shah who had examined the accused and observed that the prosecution tried to suppress the evidence with regard to the injuries

sustained by the accused. However, as a matter of fact the prosecution has examined doctor Shah who has stated that on 12.6.1991 at about 11.15 she examined the accused and at that time she found superficial burns on shoulder, chest and hands of the accused. In his statement under section 313 Cr.P.C. the accused has admitted that he had sustained those burns but has not stated that he received those burns when he tried to extinguish the fire or that he had sustained the same by accident. So, considering this peculiar circumstance one has to hold that the version given by the deceased, namely that the accused lifted burning kerosene lamp and her saree was set on fire appears to be true and correct.

13. It has also come on record that at the time of panchanama of place of offence one kerosene can as ell as kerosene lamp (chimney) were found at the place. Besides this some burn pieces of saree were found at the said place. When these articles were sent to the C.A., the C.A. reported that kerosene residue was found on those articles. It is pertinent to note that so far as kerosene lamp (Chimney) is concerned, it is not mentioned therein that it was containing kerosene though it was smelling of kerosene. One thing is certain that ultimately the actual act of

lighting is concerned, the same has been done by the accused with the help of burning kerosene lamp. It is nowhere stated that the accused set fire with the help of lighted match stick. So it may be that prior to that he might have poured kerosene or while setting fire with the help of burning lamp some kerosene might have fallen on saree and at that place. But it matters very little.

14. Thus, apart from the evidence of dying declarations and evidence of P.W.No.6 Sona Jadhav, exhibit 17 and P.W.No.7 Pramila Jadhav exhibit 20, circumstantial evidence, and in particular, the presence of the accused at the relevant time clearly indicates that accused has committed the offence in question. However, ignoring all these aspects the trial court has given undue importance to trivial and insignificant contradictions and discrepancies in the evidence of P.W. Sona Jadhav and his wife Pramila Jadhav. In fact, the three dying declarations, namely one oral which is given to Sona Jadhav and two written dying declarations before the Special Judicial Magistrate and Police Inspector respectively, are definitely having a ring of truth and same are very consistent on all material particulars. So, under such circumstances, the learned trial court should have

given due importance to the said evidence and held that the dying declaration in question are truthful and voluntary. The law with regard to dying declaration is well settled. Conviction can be based even on the dying declaration if the same appears to be truthful, voluntary and satisfies all other necessary ingredients. It is already mentioned above that all the three dying declarations do not suffer any infirmity and the same are quite cogent, consistent and convincing. So, the same have to be believed and accepted. Approach of the learned trial court is not at all legal and correct. He has assessed the evidence in totally unrealistic and unimaginative way and has not appreciated the evidence in its proper perspective and as such reached to a wrong conclusion. It is therefore necessary to set aside the finding recorded by him.

.In this view of the matter the appeal is allowed.

. The order of acquittal passed by the Sessions Judge, Nasik in Sessions Case No.245 of 1991 is set aside.

. Accused is convicted for the offence punishable under section 302 I.P.C. and sentenced to suffer rigorous imprisonment for life and to

pay fine Rs.1000/- i.d. to suffer R.I. for two months.

. Accused is entitled to get set of for the period of detention undergone by him in this case as per provisions of section 428 Cr.P.C.

. Accused to surrender his bail forthwith.

(S.S.PARKAR, J)

(S.R.SATHE, J)

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Miss.Shobha Goapl, Advocate for the Respondent absent.

CORAM : S.S.PARKAR &
S.R.SATHE,JJ.

DATED :28TH OCTOBER, 2004.

P.C :

. For the reasons recorded seperately the Court passes the following order :

. The appeal is allowed. The order of acquittal passed by the Sessions Judge, Nasik in Sessions Case No.245 of 1991 is set aside.

. Accused is convicted for the offence punishable under section 302 I.P.C. and sentenced to suffer rigorous imprisonment for life and to pay fine Rs.1000/- i.d. to suffer R.I. for two months.

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(S.S.PARKAR, J)

(S.R.SATHE, J)